Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
	)	
	)	
	)	

COMMENTS OF WESTERN WIRELESS CORPORATION

Gene A. DeJordy,
Vice President of Regulatory Affairs
WESTERN WIRELESS CORP.
3650 131st Ave., S.E., Ste. 400
Bellevue, WA 98006
(425) 586-8700

Mark Rubin
Director of Federal Government Affairs
WESTERN WIRELESS CORP.
401 Ninth St., N.W., Ste. 550
Washington, D.C. 20004
(202) 654-5903

Michele C. Farquhar
David L. Sieradzki
David L. Martin
HOGAN & HARTSON L.L.P.
555 – 13th St., N.W.
Washington, D.C. 20004
(202) 637-6462

Its Counsel

August 6, 2004

EXECUTIVE SUMMARY

The Recommended Decision is based on the flawed premise that the entry of competitive ETCs into rural markets is causing the Universal Service Fund ("USF") to grow to unsustainable levels. In fact, only seven percent of all high-cost support dollars go to CETCs. Moreover, the Recommended Decision failed to consider the many public interest benefits that greater access to telecommunications services provides to rural areas, which far outweighs the nominal additional cost of supporting CETCs. Given that *wireless use now exceeds use of ILEC service*, the Recommended Decision missed the "big picture" – that wireless is increasingly selected by consumers, urban and rural alike, as the best means of meeting their communication needs. If the Commission is serious about promoting wireless service in rural areas – the topic of a recent order and many public statements – then it must reject anti-competitive proposals like the primary line restriction contained in the Recommended Decision. Ensuring continued USF support to wireless carriers is the one proven means of promoting rural wireless service, as only USF funding can provide the needed revenue to give rural wireless carriers a real incentive to focus a larger proportion of capital expenditure to these areas. Western Wireless' build-out activity is a good example of this stimulus in action, as the company spends much more on its network in areas where it has ETC designation versus areas where it does not.

The primary line restriction would harm consumers in rural areas by denying them access to the same range of affordable services as urban consumers, including more than one single affordable telecom connection, in contravention of Section 254. The primary line proposal also fails the Communication Act's mandate that USF rules be competitively neutral. Under the proposal, CETCs have the burden to "capture" universal service funding away from the incumbent LEC, while the ILECs would continue to operate in a highly protected environment and continue to receive the same level of USF support that they have received in the past, with only limited exceptions.

The Recommended Decision also goes too far by proposes a number of unnecessary Federal guidelines for the states to use when evaluating a request for ETC designation. The Commission's analysis in the *Virginia Cellular* decision already provides adequate guidance on relevant ETC designation factors. If the Commission does adopt any of the proposed guideline criteria, however, it should make clear that they are non-binding, and that states need not – and indeed, should not – apply all of them. Keeping in mind the statutory mandate for competitive neutrality, any criteria adopted must be no more difficult for CETCs than for ILECs to satisfy.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Federal-State Joint Board on Universal Service	)))))))	 CC Docket No. 96-45

COMMENTS OF WESTERN WIRELESS CORPORATION

Western Wireless Corporation ("Western Wireless"), by counsel, hereby submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") released June 8, 2004 in the above-referenced docket, which sought comment on the Recommended Decision issued by the Joint Board on February 27, 2004. 1/ For all of the reasons explained herein, the Commission should maintain its pro-competitive rules and policies that have enabled rural consumers, for the first time, to obtain access to new and innovative services offerings by competitive eligible telecommunications carriers ("CETCs").

1/ *Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking, CC Docket No. 96-45, FCC 04-127 (released June 8, 2004), 69 FR 40839 (July 7, 2004) ("*NPRM*"); *Federal-State Joint Board on Universal Service*, Recommended Decision, 19 FCC Rcd 4257 (Joint Board 2004).

I. INTRODUCTION AND SUMMARY: THE COMMISSION MUST REJECT PROPOSALS THAT WOULD DISSERVE RURAL TELECOMMUNICATIONS CONSUMERS

No one disagrees that rural consumers "should have access to telecommunications and information service, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas," as required by Section 254(b)(3) of the Communications Act of 1934, as amended ("Act"). However, in a purported effort to help preserve the universal service high cost support fund, the Recommended Decision missed its target, and proposed solutions that, if adopted, will inflict serious collateral damage on rural consumer access to services provided in urban areas.

Implicit throughout the Recommended Decision is the notion that the entry of CETCs – consisting primarily of wireless providers – into rural markets is causing the Universal Service Fund ("USF") to grow to unsustainable levels, notwithstanding the fact that (i) the benefits of greater access to telecommunications services in rural areas far outweigh the nominal additional cost of supporting CETCs, and (ii) only seven percent of all high-cost support dollars go to CETCs, a fraction of the amount of support that continues to flow to entrenched incumbent local exchange carriers ("ILECs") that have little or no incentive to efficiently provide service and reduce their dependence on federal USF support. By making it harder for wireless CETCs to obtain USF support, the Recommended Decision would have the Commission turn back the clock on efforts to lower the barriers that discourage the deployment of robust wireless service ubiquitously throughout rural areas. Ironically, this comes at the very time the Commission has specifically recognized a need to lower such barriers *further,* rather than creating disincentives for wireless deployment. 2/

Seemingly written in a policy vacuum, the Recommended Decision missed the "big picture" – that the nation's overall reliance on telecommunications is growing, and, at the same time, wireless is increasingly chosen by consumers as the best means of meeting those needs. With virtually no consideration of the benefits of promoting deployment of wireless technology in rural areas with the support of universal service funds, the Recommended Decision summarily concluded that "deployment of rural wireless infrastructure is an important policy goal, but the reasonable comparability principle does not justify supporting multiple connections to achieve it."3/ Likewise, the Recommended Decision acknowledged the statutory mandate to develop competitively neutral rules, but failed to propose rules that satisfy this requirement.

The proposed primary line restriction clearly places the burden on the CETC to "capture" universal service funding away from the incumbent ILEC. 4/ In

---

2/ *See, e.g., Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, Report and Order and Further Notice of Proposed Rulemaking (adopted July 8, 2004).

3/ Recommended Decision at ¶ 63.

4/ "[N]o rural carrier would lose any high-cost support under our recommended approach unless a competitive ETC captures primary connections from the rural carrier following competitive ETC entry." Recommended Decision at ¶ 65. *See also* Separate Statement of Commissioner Kathleen Q. Abernathy at 2 ("First, a competitive carrier should receive support other words, a wireless ETC would be expected to build out the necessary infrastructure to enter a market without first being assured of receiving any USF support, even if it signs up customers and provides service. 5/ Rather, wireless ETCs would receive support only if their customers drop their landline service entirely and decide to rely exclusively on wireless, or if their customers, through some vague and undefined process, decide to deem their wireless phones their "primary lines." ILECs, on the other hand, have built and paid for their networks based on rate of return regulation that protects them from marketplace forces and the demands of consumers in a competitive market. Under the Joint Board's proposals in the Recommended Decision, the ILECs would continue to operate in a highly protected environment and continue to receive the same level of USF support that they have received in the past, with only limited exceptions. Rather than proposing to reform an outdated and monopoly-inspired universal service system to accommodate the evolving telecommunications needs of rural consumers, the Joint Board turns a blind eye to the benefits of a competitive universal service system and the inefficiencies of funding ILECs under rate of return regulation; instead, the Joint Board proposes changes to the universal service system that would harm rural consumers and potentially eliminate a success story of the

---

only to the extent that it "wins" the customer. And, second, an incumbent ETC might risk losing the support associated with a customer when it no longer serves the customer.") (emphasis added).

5/ Its funding would not be based on the provision of service, but on its ability to develop sufficient incentives to convince subscribers to switch their "primary line" designations away from the incumbent. While some competitive pressure would be placed on the LEC to ensure that its subscribers do not switch their primary line designations, it is well established in the telecom industry that it is much cheaper to retain a customer than to acquire a new one.

Telecommunications Act of 1996 ("1996 Act"), *i.e.*, the increase in service to rural areas.

By restricting support to "primary lines," the result of the Joint Board Recommendation, as recognized by the Joint Board members with a direct connection to rural areas, would be to treat rural consumers as second-class citizens. While consumers in urban areas can purchase as many connections as they like, with affordable prices, the Recommended Decision proposes to take that right away from rural consumers, and instead force them to select only a single supported connection, with additional connections, whether that be second lines, data or information connections, or wireless service, potentially priced significantly higher, reflecting the high cost of service in rural areas. The Recommended Decision is therefore out of touch with the needs of rural consumers. 6/ The result would be the creation of "haves" and "have-nots" with rural consumers left on the wrong side of the telecommunications divide.

In addition to the primary line proposal, the Recommended Decision sets forth a number of proposed Federal guidelines that the states could use when evaluating a request for ETC designation. If not carefully fashioned and limited, such criteria could harm the intended beneficiary of universal service, the rural consumer. The Recommended Decision even suggests that the Commission should consider whether the designation of previously designated CETCs should be

---

6/ As discussed *infra* pages 10-11, the Recommended Decision is also "out of touch" with the requirements of section 254(b)(3), which provides that rural consumers should have "reasonably comparable" access to the services, including advanced services, that are available to consumers in urban areas.

rescinded if the state finds they do not satisfy the new designation guidelines, but makes no such suggestion applicable to incumbent LECs. 7/ Indeed, much of the Recommended Decision appears to be based on the presumption that rural ILECs must be protected and preserved, notwithstanding the fact that – unlike wireless providers – they are guaranteed a specific return on investment. This guaranteed return on investment creates a perverse incentive for the rural ILECs to operate inefficiently in order to increase their costs, which in turn also would result in higher USF support. There is no basis under the Act for the continued protection of rural ILECs to the detriment of rural consumers.

The Commission recently adopted a *Rural Spectrum Order* intended "to help ensure that Americans living in sparsely populated areas will experience the breadth of wireless service offerings currently available in more densely populated areas." 8/ The Commission determined that there was a need to "eliminat[e] disincentives to serve or invest in rural areas and help[] to reduce the costs of market entry." 9/ Adoption of the Recommended Decision would have the perverse affect of undoing much of the progress made by the Commission in its recent order by *creating* disincentives and *increasing* the costs of providing service in rural America.

7/ Recommended Decision at ¶ 45.

8/ "FCC Adopts Measures to Increase Rural Investment and Facilitate Deployment of Spectrum-Based Services in Rural Areas," *News* (rel. July 8, 2004) (*"Rural Spectrum Order News Release"*).

9/ *Id.*

More importantly, the likely effectiveness of the rule changes adopted in the *Rural Spectrum Order* pale in comparison to the impact of universal service funding. Only universal service funding can provide the needed revenue to give rural wireless carriers a real incentive to focus a larger proportion of capital expenditure to these areas. The existence of competitively neutral and fully portable universal service support provides a serious stimulus to the deployment of service in unserved and underserved areas, and enables carriers to deploy the necessary facilities that then can be used to provide advanced, high quality wireless services. Western Wireless provides a good illustration of this stimulus in action, as the company spends more on its network in areas where it has ETC designation versus areas where it does not. For example, in 2004 Western Wireless expects to spend five times as much capital – and to build nine times as many cell sites – in areas in which it has ETC status, than areas in which it does not have ETC status. 10/ Without the availability of USF funding, it is impossible in some rural areas to justify the investment necessary to serve sparsely populated markets where the per-subscriber build-out costs are substantially above that for more populous markets. As a consequence, some rural areas are likely to go unserved or underserved should the Commission adopt the primary line restriction and other

---

10/ *See, e.g.*, Dan Daly, "Call for Improvement – Sparsely populated areas could attain more much-needed cell service," *Rapid City Journal,* July 6, 2004 (reporting on Western Wireless' expansion plans in South Dakota) ("*Rapid City Journal Article*") (attached as Exhibit A); *see also* Randy Dockendorf, "S.D. Cell Coverage Gets Personal" *Yankton Daily Press & Dakotan*, March 1, 2004, available at http://yankton.net (discussing Western Wireless' expansion plans in South Dakota and quoting comments of PUC chair Bob Sahr that "We are seeing millions of dollars coming into the state and being put into new towers, so we're absolutely ecstatic").

Recommended Decision proposals. If the Commission is serious about its "commitment to ensure that wireless service offerings are available throughout the country, including those living in rural America," it must resist the temptation to go for the easy "fix" that would have the unintended consequence of harming the intended beneficiaries of universal service, the rural consumers. Instead, the Commission should only implement those reform measures that satisfy the core principles of the 1996 Act: (i) quality services at just, reasonable, and affordable rates, (ii) access to advanced services in all regions of the Nation; and (iii) access to telecommunications and information services, including advanced services, that are reasonably comparable to those services provided in urban areas. Clearly, the continuation of the Commission pro-competitive universal service policies embodied in decisions dating back to the passage of the 1996 Act are consistent with these principles. Many of the Joint Board's recommendations are not.

II. CONSUMERS BENEFIT FROM WIRELESS UNIVERSAL SERVICE

A. Wireless Service Provides Unique Benefits

In making its decision on the proposals in the Recommended Decision, the Commission has a public interest obligation to consider the benefits consumers receive from wireless universal service. These consumer benefits go far beyond what the Recommended Decision lamentably disparages as the "generalized benefits of competition" 11/ that result when any new provider enters a market. As detailed below, the deployment of wireless infrastructure throughout the U.S. is in

11/ Recommended Decision at ¶ 12.

the national, state, local, and public interest, but will remain an elusive goal without addressing the economic realities of serving rural, high-cost areas. Universal service support available on a competitively-neutral basis is the only program that addresses the economic realities of serving rural America by making funding available for carriers that commit to building out the necessary telecommunications infrastructure in high-cost areas. The public interest demands that the benefits of providing universal service support to competitive carriers be the determining factor in any reform measures.

Section 254(e) of the Communications Act requires ETCs to use all USF support to upgrade and maintain their network facilities. Unlike wireline ETCs, which use their funds primarily for ongoing operations and maintenance since their networks are largely complete, wireless ETCs such as Western Wireless are using their funds to build out networks to areas that were previously unserved, to increase the service capacity of cell sites and mobile switches, to fill in coverage holes and "dead spots," and to install network upgrades to accommodate advanced services. In the past, rural consumers could expect good wireless coverage only in town centers and along major highways. Recognizing this problem, some state and local officials have begun working actively to promote wireless build-out and "zap the gaps" in coverage. 12/ USF dollars are making it financially feasible for wireless ETCs to deploy network facilities that fill such gaps and extend coverage

---

12/ *See e.g.,* "North Dakota PSC Launches Initiative to Expand Wireless Service in Rural Areas," *TR Daily*, July 27, 2004 (reporting on the North Dakota PSC's "Zap the Gap" initiative).

throughout a rural service area – including to places where consumers live and work. 13/

Urban consumers have come to expect and rely on ubiquitous wireless network availability and high-quality coverage. Now, using USF funds, wireless ETCs are bringing the same ubiquity and high-quality coverage to more and more rural areas. 14/ Chairman Powell has recognized that, as of today, not all persons in sparsely populated areas "experience the breadth of wireless service offerings currently available in more densely populated area," and that "these Americans are entitled to the same benefits and choices as those residing in urban or populated areas." 15/

Making the same types of services available in rural areas as in urban areas is precisely what Congress intended when enacting Section 254(b)(3) of the Act, which establishes as the guiding principle for the Joint Board and the Commission that:

> Consumers in all regions of the Nation, including low-income consumers and those in rural, insular and high cost areas, should have access to

---

13/ For real-life examples of how Western Wireless' USF-supported services are making a difference in a number of rural communities, see Attachment F ("Universal Service Profiles") of Western Wireless' Comments in CC Docket 96-45 (May 5, 2003) (discussing the impact of Western Wireless' offerings in Regent, ND; Reese River Valley, NV; Pine Ridge Indian Reservation, SD; and McCamey and Roberts County, TX).

14/ *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, WT Docket 02-379, Eighth Report, FCC 03-150 (rel. July 14, 2003)("*8th CMRS Report*") at ¶ 118 (citing NTCA comments that "many rural customers have access to the same state-of-the-art wireless technologies available to their urban counterparts"); *see also* Bear Stearns, "Wireless Broadband: The Impact of 801 Technology," June 2004 at 8 (noting that "[USF] support in rural territories could eventually aid the efforts" of carriers like Western Wireless to provide wireless broadband)

15/ Separate Statement of Chairman Michael K. Powell in WT Docket 02-381 (July 8, 2004).

> telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and are available at rates that are reasonably comparable to rates charged for similar services in urban areas. 16/

Thus, Congress was concerned not merely that rural consumers have access to *one* or *some* service, but that they have access to services "reasonably comparable" to those services available to persons in urban areas. Universal service funding is needed to ensure this happens. There can be no "reasonably comparable" services for rural consumers without wireless service that is both ubiquitous and of high quality. As 19 Members of Congress explained in a May 7, 2004 letter to Chairman Powell, withholding support from mobile phones or other second lines as the Recommended Decision proposes would "put[] rural consumers at a distinct disadvantage to their urban counterparts," and would "contravene the spirit and purpose of Section 254." 17/

In addition to the statutory directive, the expansion and upgrade of wireless service in rural areas presents a number of public interest benefits that should be considered by the Commission:

16/ 47 U.S.C. § 254(b)(3). A number of Joint Board members noted that Section 254's "reasonably comparable" provision relates not only to rates, but also applies to consumers' access to the same variety of services, including advanced services. *See Joint Separate Statement of Commissioners Jonathan S. Adelstein, G. Nanette Thompson, Regulatory Commission of Alaska, and Bob Rowe, Montana Public Service Commission Approving in Part, Dissenting in Part,* FCC 04J-1 (Feb. 27, 2004) at 2.

17/ *See* Letter from Sam Graves, Member of Congress, *et al.*, to FCC Chairman Michael Powell (May 7, 2004) (primary line restriction "runs wholly counter to the principle of advancing affordable and advanced telecommunications as set forth in section 254); Letter from Senator Byron Dorgan, *et al.*, to the Joint Board (Dec. 18, 2003) (primary line restriction would be a "major step backward that would thwart the essential purpose of universal service").

- *Safety / emergency access*. Wireless service provides the ability to access first responders from anywhere in case of emergency. E-911, where available, makes this functionality even more valuable. Wireless access to emergency services is nowhere more needed than in sparsely populated areas, where help is more difficult and time consuming to summon than in densely populated areas. 18/ The amount of effort the Commission has devoted to wireless E911 proceedings is testament to the importance it places on the ability of consumers to reach emergency services from mobile phones.

- *Mobility*. Greater consumer satisfaction is achieved by wireless service that provides full access from anywhere, to anywhere, including when mobile. As the Commission has recognized, this is particularly advantageous in rural areas, where many people spend considerable time traversing large distances. 19/

18/ Rural consumers frequently list safety as a major reason for subscribing to mobile service. *See e.g.*, Foundation for Rural Service, "Survey Reveals Wireless Displacement of Wireline is Not a Just a Threat, But an Emerging Reality " (June 7, 2004), available at http://www.frs.org/ka/ka-3.cfm?content_item_id=2211&folder_id=349, at 2 (listing safety as the prime motivating factor in the purchase of wireless service for rural youth) ("*FRS Press Release*"); *Rapid City Journal* (attached as Exhibit A) (reporting comments from South Dakota PUC chair Bob Sahr, attributing increasing popularity of wireless service in part to fact that "people spend a lot of time on the road, and cell phones offer a measure of security during blizzards and other bad weather"); *Federal-State Joint Board on Universal Service, Virginia Cellular, Inc., Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia,* CC Docket 96-45, Memorandum Opinion and Order, FCC 03-338 (rel. Jan. 22, 2004)(*"Virginia Cellular"*) at ¶ 29 ("the availability of wireless universal service offering provides access to emergency services that can mitigate the unique risks of geographic isolation associated with living in rural communities").

19/ *See Virginia Cellular* at ¶ 29 ("the mobility of telecommunications assists consumers in rural areas who often must drive significant distances to places of employment, stores, schools, and other critical community locations"). While mobility, as well as advanced services such as broadband are not "supported services," carriers may spend USF money on the basic infrastructure used to provide the support services, which also could be used as a platform for providing other services and functionality pursuant to the Commission's "no barriers" policy. *See Federal-State Joint Board on Universal Service*, Fourteenth Report and Order, 16 FCC Rcd 11244 (rel. May 23, 2001) at ¶ 200.

- *High-speed and broadband services.* Wireless ETCs are beginning to deploy even in rural areas, bringing benefits of mobile Internet-based applications to consumers in high-cost areas. In some of these areas, wireless broadband can be the main broadband option, given the distance limitation of DSL. To date, Western Wireless had deployed CDMA 1xRTT coverage in over 400 counties in 16 states. The company is also deploying GSM/SPRS technology in half of its sites to facilitate roaming.

- *Economic development.* Business people have become dependent on wireless communications services to stay in contact with associates and clients at all times. Businesses are more likely to locate in communities with excellent wireless coverage, and with competitive alternatives for telecom services.20/ Moreover, wireless carrier entry into a new area will generate jobs and local expenditures as the carrier establishes retail outlets, leases site space, constructs and maintains sites, etc.

- *Competitive Pricing.* Wireless carriers offer rate structures that better meet many consumers' needs. In turn, competition from wireless creates strong incentives for wireline carriers to follow suit. For example, plans that feature broader (or unlimited) "local" calling areas or "bundles" of minutes, including local and long-distance, can reduce the overall monthly total cost that many subscribers, particularly those in rural areas, pay for communications services. 21/ The response by consumers to such plans has been so favorable that some wireline carriers are now beginning to offer them.

20/ According to Bruce Bohnsack, President of the Foundation for Rural Service, "As the concept of a rural brain drain becomes a greater reality for rural areas, it is imperative that rural businesses are equipped with the resources to provide high-level service that is comparable to their urban counterparts." *FRS Press Release* at 2. *See also Rapid City Journal Article* (attached as Exhibit A) ("good [wireless] service has become an economic development requirement").

21/ *See 8th CMRS Report* at ¶ 105-106 (citing at least nine carriers offering unlimited local calling plans). The Recommended Decision recognized that the Commission has taken such

- *Competitive Incentives for Improved Customer Service.* Market entry by wireless ETCs also forces both wireless and wireline providers to place a greater focus on customer service – *e.g.*, answer the phones more quickly, ensure that service requests are properly and timely provisioned in order to be competitive. 22/ Deployment of wireless infrastructure and the resulting better coverage enables wireless carriers to offer more reliable and robust service, which in turn enables rural consumers – like their urban counterparts – to consider either "cutting the cord" and exclusively using wireless, or continuing to use both wireless and wireline (while relying on wireless to a greater and greater extent).

B. Consumers Are Increasingly Relying on Wireless Service

In areas where wireless is a choice, consumers have spoken and have chosen wireless to meet some or all of their communications needs. ILEC access line counts are consistently going down, while wireless subscriber lines are consistently going up. 23/ Likewise, wireline long distance is also losing market share to wireless. 24/ There are now nearly 160 million wireless subscriber lines,

---

factors into consideration when making public interest evaluations in ETC designation proceedings. Recommended Decision at ¶41.

22/ Over 30 wireless carriers, including Western Wireless, have agreed to abide by the 10-point Consumer Code developed by CTIA, which helps to ensure customer expectations are met. *See* http://www.ctia.org/wireless _consumers/consumer _code/.

23/ *See* Federal Communications Commission, "Local Telephone Competition: Status as of December 31, 2003" (June 2004) ("*2004 Local Competition Report*") at Tables 1 and 13; *8th CMRS Report* at ¶ 103 ("Verizon, SBC, and BellSouth saw business and consumer access lines fall 3.6, 4.1, and 3.2 percent, respectively, in 2002, for a total decrease of 5.5 million lines, with wireless substitution being a significant factor.").

24/ *8th CMRS Report* at ¶¶ 103-04 ("long distance, local, and the payphone segments of wireline telecommunications have all been losing business to wireless substitution. . . . [E]ven the prepaid calling card business is suffering, as consumers are now 'utilizing their wireless rapidly gaining on the 181 million wireline switched access lines. 25/ In fact, *consumers now use more wireless service than ILEC service.* 26/ There are even indications that wireless is being embraced more rapidly in rural areas than in the cities. For example, a recent survey of rural youth (age 18-24) conducted jointly by the National Telecommunications Cooperative Association and the Foundation for Rural Service found an 86% penetration rate, which "is significantly higher than estimations for the youth market nationally." 27/ In 2003, independent consultant Western Wats conducted a survey of rural residents in Western Wireless' service areas and found a 34% increase in consumer use of wireless phones over the prior two years, with no increase of the number of wireline phones. In largely rural states like South Dakota, Nebraska and Mississippi, this trend has resulted in such states having *more wireless subscribers than local exchange access lines.* 28/

C. The Recommended Decision Overstates the Costs and Understates the Benefits of Wireless Universal Service

As noted above, the Recommended Decision assumes, without saying so explicitly, that the primary cause of USF problems is competitive entry. This is

---

phones for the same reasons they once used prepaid phone cards.' . . . [A] number of analysts argue that wireless service is cheaper than wireline.").

25/ *2004 Local Competition Report* at Tables 1 and 13.

26/ *Id.*

27/ *FRS Press Release* at 1 (announcing results of the third annual Rural Youth Survey on Telecom Usage).

28/ *See 2004 Local Competition Report* at Tables 6 and 13; *see also* Andrea Domaskin, "State Has More Cells than Home Phones," *Yankton Daily Press & Dakotan*, March 13, 2004, available at http://yankton.net.

simply not true. From 1999 to 2004, the growth of funds received by ILECs amounted to 85% of total high-cost fund growth. Today CETCs receive only about 7% of total high-cost funding. 29/ As detailed in Section II.A above, the Recommended Decision makes no effort to consider the corresponding benefits of wireless universal service, including expanded coverage, advanced service offerings, mobility and improved competition. In addition, the Commission should consider that wireless is an efficient network technology for high-cost areas, as compared to wireline networks. While both wireline and wireless service are more costly per customer served in rural areas, wireless is better suited than wireline to serve low population density areas, given the reduced amount of physical infrastructure needed. Wired service typically requires substantially more investment per line than wireless service in rural areas. Even if receiving universal service funds, wireless carriers provide service with lower overall subsidies, as they do not receive implicit subsidies via access charges and have no rate of return guarantee. 30/ Moreover, wireline companies have continued to be highly fragmented, resisting consolidation that could bring economies of scale and more efficient operations. Thus, wireless carriers are comparatively more efficient providers in rural areas.

29/ These figures were computed based on data from the Universal Service Administrative Co.'s quarterly filings, available at http://www.universalservice.org/overview/filings/.

30/ *See* Economics and Technology, Inc., "Lost in Translation: How Rate of Return Regulation Transformed the Universal Service Fund for Consumers into Corporate Welfare for the RLECs," filed as an attachment to Reply Comments of Western Wireless in RM-10822, CC Docket No. 96-45 (Feb. 13, 2004).

D. Concern About Fund Growth Must Be Addressed by Changing the Funding Mechanism

If the concern is, as stated, really about the growth of the high cost fund – and not about protecting the rural ILECs from competition – that concern should be addressed by focusing on the root cause of the growth: the current funding mechanism. Specifically, the Commission should re-examine the basis of support for rural ILECs and move toward use of forward-looking costs or some form of price cap regulation, rather than the rate-of-return/embedded cost methodology. In its Petition for Rulemaking to Eliminate Rate of Return Regulation of ILECs, Western Wireless has demonstrated that basing USF on rate-of-return regulation results in an unnecessarily bloated fund. Moreover, that system creates incentives for inefficiency and opportunities for fraud, waste, and abuses such as cross-subsidies and cost misallocations. It also impedes innovation and poses an effective barrier to entry, since rural ILECs' revenues are targeted to achieve a guaranteed return on investment, while their competitors receive funding only to the extent they serve customers, and their investments are at risk. 31/

Western Wireless applauds the FCC's seeking comment on this issue in the *Rural/Non-Rural Referral Order*. 32/ Funding should not turn on a particular carrier's size or choice of technology; it should be focused instead on the

31/ *See generally* Western Wireless Corp., Petition for Rulemaking to Eliminate Rate-of-Return Regulation of Incumbent Local Exchange Carriers (Oct. 30, 2003).

32/ *Federal-State Joint Board on Universal Service*, Order, FCC 04-125 (rel. June 28, 2004) at ¶ 11 ("*Rural/Non-Rural Referral Order*").

needs of consumers in a particular geographic area, measured based on the costs of the least-cost technology.

At a minimum, as the Joint Board proposes, 33/ the Commission should adopt per-line caps on support upon competitive entry to avoid spiraling increases as competitors enter. Although the Recommended Decision asserts this step is necessary due to its proposed primary line restrictions, caps should be adopted whether or not primary line restrictions are adopted. The Commission should also reconsider the use of "study area caps" which Western Wireless proposed and the Recommended Decision summarily rejected. 34/ Such caps would have the same impact on funding as the primary line restriction, but without the anti-competitive impact and administrative burdens and complexities.

III. PRIMARY LINE RESTRICTIONS ARE NOT THE MOST EFFECTIVE MEANS TO CONTROL THE GROWTH OF THE FUND

A key component of the Recommended Decision's proposal is to limit USF support to one "primary" line. In the attached document, "A Primary Line Restriction Would Harm Rural Consumers and Disserve the Public Interest" (Exhibit B), Western Wireless explains why the Commission should reject this proposal. In short, primary line restrictions would harm consumers in rural areas by denying them access to the same range of affordable services as urban consumers, including more than one single affordable telecom connection. A diverse group of

33/ Recommended Decision at ¶¶ 77-80.

34/ Recommended Decision at ¶ 71.

parties agree – from dissenting members of the Joint Board, 35/ to numerous members of Congress from both parties, 36/ to both rural ILECs and CETCs. As indicated in Section II.C above, if the goal is to limit fund growth, there are more effective – and more direct – means to achieve that worthy goal.

Equally troubling is the Joint Board recommendation in favor of essentially holding harmless the RLECs, but subjecting CETCs, to the full impact of a primary line restriction on funding. Such an approach would clearly be contrary to the non-discrimination requirements of the Act and the FCC's competitively-neutral policies. There can be no rational basis for guaranteeing revenue neutrality for rural ILECs, while subjecting CETCs to potentially substantial revenue reductions that could not have been anticipated by CETCs entering and providing universal service in rural markets. 37/

IV. ANY NEW PUBLIC INTEREST CRITERIA MUST BE NON-DISCRIMINATORY AND COMPETITIVELY NEUTRAL

The Recommended Decision proposes that the Commission establish federal guidelines for states to use when determining whether it is in the public

---

35/ *See Joint Separate Statement of Commissioners Jonathan S. Adelstein, G. Nanette Thompson, Regulatory Commission of Alaska, and Bob Rowe, Montana Public Service Commission Approving in Part, Dissenting in Part,* FCC 04J-1 (Feb. 27, 2004) ("The primary line recommendation would be harmful to consumers. . . . Limiting support to primary lines would deny rural consumers comparable access to a variety of telecommunications services.").

36/ *See* Letter from Sam Graves, Member of Congress, *et al*., to FCC Chairman Michael Powell (May 7, 2004) (primary line restriction "runs wholly counter to the principle of advancing affordable and advanced telecommunications as set forth in section 254); Letter from Senator Byron Dorgan, *et al*., to FCC Chairman Michael Powell (Dec. 18, 2003) (primary line restriction would be a "major step backward that would thwart the essential purpose of universal service").

37/ *See* Recommended Decision at ¶¶ 73-75.

interest to designate a new ETC. It is unclear that any new criteria are needed, given that states in general have demonstrated an ability to correctly assess and analyze the factual data to reach an appropriate conclusion. Moreover, the Commission's analysis in the *Virginia Cellular* decision 38/ already provides useful guidance on relevant ETC designation factors; the wide-ranging considerations proposed in the Recommended Decision go too far. Nevertheless, if the Commission does adopt any of the proposed guideline criteria, it should make clear that they are non-binding, and that states need not – and indeed, should not – apply all of them. Keeping in mind the statutory mandate for competitive neutrality, any criteria adopted must be no more difficult for CETCs than for ILECs to satisfy. The attached document entitled "Any New ETC Designation Guidelines Must Be Competitively Neutral and Non-Discriminatory" (Exhibit C) analyzes the criteria set forth in the Recommended Decision and explains which would satisfy this requirement. Specifically, Western Wireless urges the Commission to reject six specific proposed criteria, including those relating to adequate financial resources, equal access, emergency functionality, ILEC consumer protection requirements, minimum local usage quantities, and amount of per-line support. In any event, the Commission should certainly reject the suggestion that any new criteria adopted be applied to competitive ETCs that have already received designation, but not to incumbent ETCs.

38/ *See Federal-State Joint Board on Universal Service, Virginia Cellular, Inc., Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket 96-45, Memorandum Opinion and Order, FCC 03-338 (rel. Jan. 22, 2004).

V. CONCLUSION

In conclusion, Western Wireless urges the Commission to conclude this rulemaking in a manner consistent with these comments and with Western Wireless' comments and reply comments filed with the Joint Board.

Respectfully submitted,

WESTERN WIRELESS CORPORATION

By: */s/ David L. Sieradzki*

Michele C. Farquhar
David L. Sieradzki
David L. Martin
HOGAN & HARTSON L.L.P.
555 – 13th St., N.W.
Washington, D.C. 20004
(202) 637-6462

Its Counsel

Gene A. DeJordy,
Vice President of Regulatory Affairs
WESTERN WIRELESS CORP.
3650 131st Ave., S.E., Ste. 400
Bellevue, WA 98006
(425) 586-8700

Mark Rubin
Director of Federal Government Affairs
WESTERN WIRELESS CORP.
401 Ninth St., N.W., Ste. 550
Washington, D.C. 20004
(202) 654-5903

August 6, 2004

EXHIBIT A

"Call for Improvement – Sparsely populated areas could attain more much-needed cell service"

Rapid City Journal
July 6, 2004

Rapid City Journal.com

Call for improvement

Print Page

Sparsely populated areas could attain more much-needed cell service

By Dan Daly, Journal Staff Writer

RAPID CITY — New Cellular One cell-phone towers might be in the works for Rosebud Indian Reservation and surrounding counties, Bob Sahr of the South Dakota Public Utilities Commission, said last week.

However, Mikal Thomsen, president of Western Wireless, parent company of Cellular One, stopped short of committing to the new sites.

On Friday, Thomsen said the company has been in talks with Rosebud officials and the PUC about adding new towers in that corner of western South Dakota. "At least some of this investment hinges on an application we have in front of the (PUC)," he said in an e-mail Friday. "As that is a pending matter, I can't comment on it one way or another."

Western Wireless, which does business in 19 states, will invest more money in South Dakota this year than it will in Texas, Thomsen said. He said the company has invested more than $160 million in South Dakota over the past 15 years, the bulk of it coming in the past three years. He said the company has added cell sites and expanded its digital phone service in the state.

Tony Rodgers, executive director of Rosebud Sioux Tribe Utility Commission, was not available for comment last week. Sahr said south-central South Dakota needs better coverage. He said cell phone users on and around the Rosebud reservation have been served in the past primarily by a single cell tower in Valentine, Neb.

"This is an area that will really benefit from improved cell service. It's been spotty to nonexistent," he said.

Sahr said cellular phone service is becoming increasingly vital to rural areas of South Dakota. People spend a lot of time on the road, and cell phones offer a measure of security during blizzards and other bad weather. Also, as businesses and individuals increasingly rely on cell phones, good service has become an economic development requirement.

That is one reason why the Federal Communications Commission has been subsidizing service to the nation's isolated, rural areas. The Universal Service Fund was created under the Telecommunications Act of 1996 to make it feasible for providers to serve high-cost regions of the country.

Thomsen said the Universal Service Funding has allowed Western Wireless to make a significant investment in South Dakota. Each proposed cell is evaluated for its potential return on the company's investment. The subsidy payments don't cover all of the cost, but they can make a site profitable, he said.

"Universal Service revenue has been the source of funds that has moved a number of South Dakota sites from the 'negative return' list to the 'positive return' list," he said. Western Wireless gets Universal Service funding in South Dakota and North Dakota, but not Montana.

"In 2004, we are spending five times as much capital and building nine times as many cell sites in the Dakotas as we are in Montana because of this," he said.

Competitor Verizon Wireless, meanwhile, has added four new cell towers in western South Dakota and one in the south-central part of the state this year, Karen Smith, spokeswoman for Verizon, said.

The new towers are in Belle Fourche, near Black Hawk, on Sturgis Road, north of Pierre, and at Gregory.

Verizon doesn't release specific information about its future plans, she said, but in the near future, the company has committed to building 16 new towers in South Dakota this year. She said Verizon invested $27 million in South Dakota in 2003 and about $52 million between 2001 and 2003.

She said decisions on where to add new towers are based on coverage and capacity. Some towers primarily expand the coverage area, but others are intended to handle an increasing volume of calls. "All provide some measure of both," she said.

According to its coverage map, Verizon in western South Dakota primarily serves the more populated areas of western South Dakota. Its coverage includes the Black Hills, areas along Interstate 90, areas around Pierre and Mobridge, and isolated areas in the northwest part of the state. Verizon does not receive federal Universal Service funding for South Dakota.

Cellular One, according to its coverage map, serves a much broader West River swath. The map shows only four main areas that it does not cover: the higher elevations of the Black Hills, two wide areas between Buffalo and Mobridge, and the south-central region around Mission. The latter zone is where the new towers are going up.

Of course, coverage maps don't always completely show the actual coverage in a given area. Factors such as topography and cell phone equipment can affect the strength of the cellular signal.

Cellular One, for instance, has five cell towers on the Pine Ridge Indian Reservation, but tribal members complain that reception is poor in a lot of areas of the reservation.

If there is any question about how popular cell phones have become, the PUC recently prepared a map of South Dakota showing the number of cell phone subscribers in the state.

The map counted the number of 2003 cell phone accounts and divided that by the county's population.

Pennington County, for instance, had more than 42,000 cell phones in a county with 88,500 people. That means 48 percent of the county's residents are equipped with cell phones.

Jerauld County in east-central South Dakota led the state: 62 percent of its population had cell phones.

Minnehaha came in at a close second with 61 percent, and a number of counties were between 40 and 59 percent.

But there are areas of the state, especially west of the Missouri River, where few people use cell phones.

Todd County, where the new Cellular One towers are going in, only 1 percent of the population has cell phones.

Often, the reason is that the region lacks adequate cellular service, according to Sahr.

Contact Daly at 394-8421 or Dan.Daly@rapidcityjournal.com

EXHIBIT B:

A Primary Line Restriction Would Harm Rural Consumers And Disserve the Public Interest

- ***Rural Consumers Are Entitled to Affordable Service for "Non-Primary" As Well As "Primary" Lines.*** Section 254 entitles rural consumers to "just, reasonable and affordable" and "reasonably comparable" rates and services. The Act does not restrict these rights to "primary lines." Rural consumers want and need multiple connections just as much as consumers elsewhere.

- ***A "Primary Line" Restriction Would Prevent Rural Consumers From Obtaining Wireless Service That They Want and Need.*** Rural consumers increasingly rely on wireless for their telecom needs and stand to benefit as wireless/wireline competition intensifies. A primary line restriction on universal service funding, however, would make it difficult, if not impossible, for rural consumers to obtain wireless service.

- ***A "Primary Line" Restriction Would Dramatically Reduce Incentives For Wireless Carriers To Deploy And Upgrade Facilities In Rural Areas.*** Wireless carriers, like wireline carriers, need universal service support for deploying network facilities and services in high-cost rural areas. A primary line restriction would severely limit deployment of wireless service in many rural areas.

- ***A "Primary Line" Restriction Would Be Contrary to the Communication Act's Universal Service Provisions.*** Numerous members of Congress, including those involved in drafting the Telecommunications Act of 1996, have expressed this view.

  – *A primary line restriction would be a "major step backward that would thwart the essential purpose of universal service."* – December 18, 2003 letter to the Joint Board from Senators Conrad Burns, Byron Dorgan, Thomas Daschle, Tim Johnson, Max Baucus, Olympia Snowe and Blanche Lincoln.

  – *A primary line restriction "would contravene the spirit and purpose of Section 254. . . . [S]uch a restriction would dramatically reduce incentives for the deployment and upgrade of facilities in rural areas."* April 6, 2004 letter to Chairman Powell from Senators Byron Dorgan, Conrad Burns, Ted Stevens, Lamar Alexander, Olympia Snowe, Sam Brownback, Michael Enzi, Tom Harkin, Tim Johnson, Pat Roberts, Chuck Grassley, Blanche Lincoln, Craig Thomas, George Allen, Judd Gregg, Evan Bayh.

  – *A primary line restriction "runs wholly counter to the principle of advancing affordable and advanced telecommunications as set forth in section 254. . . . [It] puts rural customers at a distinct disadvantage to their urban counterparts."* – May 7, 2004 letter to Chairman Powell from Representatives Sam Graves, Rick Boucher, Phil English, Charles Stenholm, Bob Ney, Neil Abercrombie, Tom Latham, Earl Pomeroy, Timothy

Johnson, Chet Edwards, Jo Ann Emerson, Ed Whitfield, Jim Leach, Mark Udall, Doug Bereuter, Ike Skelton, Bobby Etheridge, Ruben Hinojosa, and Spencer Baucus.

- ***Primary Line Restrictions Would Not Be An Effective Means to Slow the Growth of the High-Cost Fund.***

  – In support of its recommendation to restrict support to primary lines only, the Recommended Decision cites the need to limit growth of funding to CETCs in order to preserve the sustainability of the universal service fund. Limiting fund growth is a valid and important goal, but a primary line restriction is not the best way to achieve that goal.

  – **CETCs Account for a Small Minority of the High-Cost Fund.** Support to ILECs amounts to about 93% of high-cost fund disbursements, and about 85% of high-cost fund growth over the past 5 years. Thus, a primary line limitation, which would disproportionately affect CETCs, would have a negligible impact on the size or growth of the fund.

  – **Alternative, Competitively Neutral Policies Should Be Considered To Limit Fund Growth.**

    » *Per-line caps on RLEC funding* in each study area upon CETC entry should be adopted, as recommended by the Joint Board. Such a step would effectively limit fund growth. It would eliminate both the "snowball effect," in which the support per-line increases with every line that the incumbent loses, and the anti-competitive impact of the ILEC's perverse incentive to increase its capital expenditures to increase its high-cost support.

    » *Study area funding caps* (*i.e.*, cap the total funding in a study area upon CETC entry, and divide funds among ETCs based on the proportion of lines they serve) would be competitively neutral, easy to administer, and would limit fund growth in the exact same manner as a primary line restriction. The Commission should consider this proposal seriously, even though the Joint Board, with virtually no analysis, declined to pursue it.

    » *Support based on forward-looking economic costs or some form of price cap regulation* would effectively limit the growth of the fund, and would provide an efficient, pro-consumer and pro-competitive universal service system, as Western Wireless has shown in its Petition for Rulemaking to Eliminate Rate-of-Return Regulation. The Joint Board and the Commission should seriously explore this proposal in the "rural high-cost support proceeding" recently initiated by an FCC Referral Order.

- ***A Primary Line Restriction Is Not a Simple Matter – It Would Require Far-Reaching Policy Changes At the State, As Well As Federal, Levels.***

  – **If only "primary lines" were eligible for universal service support, then rural ILECs would need to be regulated very differently at both the state and federal levels.**

Rural ILECs would need authority from state PUCs to raise the rates for non-“primary” connections to levels reflecting the absence of high-cost support.

– **A primary line restriction would make it critically important to determine which line is designated as “primary,” which could lead to “slamming” consumers’ primary line designations.** Carriers would have to share private customer data to determine whether multiple carriers offer service to a single “household.” Such inter-carrier coordination would be quite complex and difficult to implement.

– **To implement a primary line restriction, regulators would have to address such issues as how to define a “household” for purposes of ensuring that only a single line per household receives support.** For example, consider an unmarried couple living together, in which each partner has his or her own phone: is that two “primary lines” or only one – and if only one, then which one is “primary”? Communications regulators and carriers should not place themselves in the position of making such social policy judgments.

- ***When Consumers Purchase Universal Service From Multiple ETCs (e.g., Wireless and Wireline), It May Not Be Possible to Determine Which Carrier’s Service is “Primary”??*** A presumption that either incumbents or new entrants provide the “primary line” would violate competitive neutrality and the Act.

  – **Consumers should drive the process based on their real-world marketplace choices – not through filling out an arbitrary survey form asking, “which is your primary line?”** Asking consumers which connection *they* consider to be “primary” would not solve the problem. Consumers may well call their wireline phones “primary,” given that the root of the word “primary” means “first” – but the 1996 Act forbids policies that give ILECs advantages simply because they were there “first.”

  – **What would be the default if consumers fail to fill out the form?** Rather than designating the ILEC as the default – which would be grossly discriminatory and unlawful – it would make more sense to designate the line over which the greatest number of calls were placed, or over which the greatest number of minutes traversed. In many cases, the wireless CETC’s lines would be deemed primary using such a criterion.

  – In any event, such a process would be costly and difficult to implement.

- ***Each of the options discussed by the Joint Board to limit the impact of primary line restrictions on rural ILECs would disproportionately harm CETCs and would contravene competitive neutrality, in violation of the Act.***

  – The “lump sum payment” proposal (¶ 74) provides substantially more funding to ILECs than to CETCs, whether measured on a per-line basis or a per-primary-line basis. It therefore violates competitive neutrality, as the Recommended Decision recognizes.

  – The so-called “hold harmless” proposal (¶ 75) would hold ILECs harmless, but would be very harmful to CETCs. It violates portability competitive neutrality because the ILECs would qualify for ever-increasing amounts of per-line support, but CETCs' support would be frozen to the per-line amount that was available when they were designated.

– The "restatement proposal" (¶ 73), while purporting to adhere to portability (identical support per-primary-line, although not per-line), also would have a disproportionately harmful impact on CETCs. ILECs initially would be guaranteed the same USF revenue as before, regardless of how many of the ILEC lines were deemed "primary," while CETCs would lose revenue if *any* of their lines were *not* deemed "primary."

» The harmful and anti-competitive nature of the "restatement proposal" can be illustrated by a numerical hypothetical. Consider a wire center with two designated ETCs in a given wire center: an ILEC and a wireless CETC. Further hypothesize that the ILEC provides 100,000 lines to 80,000 unique customers (*i.e.*, at least 20,000 are "non-primary"). Assume that the CETC serves 10,000 wireless phones, of which 5% (500 phones) represent customers who have no wireline phone and whose only phone is wireless.

» Before implementing primary line restrictions, the following would apply:

	# lines	# primary lines	Total support	Support per primary line	Support per line
ILEC	100,000	n/a	$1,000,000	n/a	$10.00
CETC	10,000	n/a	$10,000	n/a	$ 10.00

» After implementing a primary line restriction subject to the "restatement proposal," the following would result if all 80,000 ILEC customers initially deem their ILEC phone to be their "primary line" regardless of whether they also have wireless phones:

	# lines	# primary lines	Total support	Support per primary line	Support per line
ILEC	100,000	80,000	$1,000,000	$12.50	$10.00
CETC	10,000	500	$6,250	$12.50	$ 0.63

» However, the following would result if half of the 9,500 customers who take service from both wireline and wireless ETCs designate the ILEC as primary and the other half of these customers designate the CETC as primary:

	# lines	# primary lines	Total support	Support per primary line	Support per line
ILEC	100,000	75,250	$1,000,000	$13.29	$10.00
CETC	10,000	5,250	$69,772	$13.29	$ 6.98

– The unfairness is clear. upon the initial implementation of the plan, the ILEC would not lose one dollar of support, no matter how many customers deem their ILEC lines as "primary;" while the CETC would lose substantial amounts of support unless it can persuade the vast majority of its customers to designate their wireless lines as "primary."

– This would be anything but a level playing field, contrary to the pro-competitive intent of the Act.

EXHIBIT C:

Any New ETC Designation Guidelines Must Be Competitively Neutral and Non-Discriminatory

- ***It Is Unclear That New ETC Guidelines Are Needed***

  – **Most States Are Getting It Right.** The Joint Board cites a number of state commission that conducted a detailed assessment and analysis of factual information and reached rigorous and well-developed conclusions. (This trend was continued recently by the Washington UTC's grant of ETC status to AT&T Wireless, finding that such grant would "further the principles of competitive and technological neutrality" and increase the diversity of supply of telecommunications services. 39/) Likewise, the FCC's new approach – following the *Virginia Cellular* precedent – while imperfect, is superior to the virtually limitless set of criteria set forth in the Recommended Decision.

  – **Guidelines Must Be Non-Binding and Optional.** Any new guidelines issued by the FCC must not be deemed a "core set of minimum guidelines," but rather must be a non-binding and flexible set of optional analytical criteria, and it should be made clear that states can select among them and need not (and should not) utilize all of them.

    » Under the Fifth Circuit's *Texas OPUC v. FCC* ruling, the extent to which the Act permits the FCC to restrict state commissions' conduct of the ETC designation process is highly unclear.

  – **The Standard Is Different in "Non-Rural" ILEC Areas.** The statute deems designation of additional ETCs in *non-rural* ILEC areas to be *per se* in the public interest as long as they offer the services included within the "definition of universal service" and meet the other statutory criteria. The FCC need not and should not revisit its recent conclusion that no changes are needed to the "definition of universal service."

- ***Competitive Neutrality is a core principle, and any new guidelines regarding ETC criteria must satisfy it.***

  – Thus, the criteria must be no more difficult for CETCs than for ILECs to satisfy, and must be technologically neutral (precludes criteria that are impossible for wireless carriers to satisfy).

  – Moreover, ETC criteria must be narrowly targeted to advance the universal service goals of §§ 214(e) and 254. ILEC requirements must not be imposed willy-nilly on wireless

39/ *See In the Matter of AT&T Wireless for Designation as an Eligible Telecommunications Carrier*, Docket No. UT-043011, Order No. 1 (WUTC Apr. 13, 2004).

carriers, if those requirements are geared to controlling the ILECs' market power or enforcing a system of pervasive regulation (*e.g.*, tariffing, rate regulation, etc.).

- ***Any re-examination of ETCs' compliance with the new designation guidelines/criteria, and any new reporting/auditing burdens, should apply equally to ILECs as well as to CETCs***

  – The Commission must reject the Joint Board's apparent suggestion that new criteria be applied to competitive ETCs that have already received designation (¶ 45), but not to incumbent ETCs that have already received designation. To ensure competitive neutrality and non-discrimination, any new procedural requirements and jeopardy of losing ETC status must apply equally to ILECs as well as CETCs.

  – Similarly, any new annual certification and reporting process (¶¶ 46-48) must apply equally to ILECs as well as CETCs.

  – Indeed, somewhat more rigorous reporting is needed for carriers subject to rate-of-return regulation (for the hopefully short time period during which that outmoded system is retained). For example, the Commission should require periodic independent audits to verify proper classification and reporting of loop counts and network investments, compliance with cost accounting manuals and controls, compliance with affiliate transaction rules, proper booking of costs and recording of interest expenses, and other accounting matters.

- ***Assessment of the Criteria Discussed in the Recommended Decision***

Appropriate Criteria

Commitment and Ability to Provide the Supported Services (¶¶ 23-27) is an appropriate criterion to consider. *See South Dakota Preemption Declaratory Ruling.* However, CETCs must not be obligated to commit to use all universal service funds they receive for incremental capital investments – ILECs are subject to no such requirement.

Criteria That Should NOT be Used

Adequate Financial Resources (¶ 22) would be an unnecessary and potentially burdensome criterion to use, since the "commitment and ability" test addresses the same public policy concern. In addition, such a criterion would open the door to an intrusive and unnecessary inquiry into an unregulated carrier's finances

Appropriate Criteria	**Criteria That Should NOT be Used**
	Equal Access as a condition for ETC designation (¶ 29) – whether imposed nationwide or on a "voluntary" basis by a single state, such a requirement violates § 332(c)(8) of the Act, which precludes equal access requirements on CMRS carriers, and is unnecessary, since CMRS carriers lack market power over long distance. Accordingly, the Commission should decline to revisit its *Kansas Declaratory Ruling* precedent. Even imposing equal access requirements *only if* all other ETCs relinquish their designation (¶ 28) is problematic and ultimately unnecessary, since ILECs never have and never will voluntarily relinquish their ETC designations.
	Emergency Functionality (¶ 30) is unnecessary as an ETC criterion. Informed consumers can do a much better job than regulators in determining the type of emergency functionality that they most want and need. For example, while certain (but not all) wireline phones may be more reliable in the event of a power outage, mobile wireless phones are much better suited than wireline phones to address needs that arise during emergencies such as auto accidents and other critical circumstances that occur when users are away from home or a workplace.
Baseline Consumer Protection Requirements such as the CTIA Consumer Code are not necessarily problematic, as long as they make sense with respect to the technology and the competitive status of the carrier to which they are applied.	Unbounded application of state PUCs' *ILEC Consumer Protection Requirements* to wireless carriers (¶¶ 31-34) can often be problematic, since those requirements were developed in the context of a specific technology (copper wire) and specific market conditions (local monopoly) that do not apply to wireless ETCs.

Appropriate Criteria	**Criteria That Should NOT be Used**
Access to Local Usage consistent with existing rules and precedent (¶ 19) is already an ETC criterion, and is not problematic.	Requiring wireless ETCs to offer a *Specified Quantity of Local Usage* comparable to ILEC calling plans (¶¶ 35-36) would violate technological and competitive neutrality, since wireless networks have more traffic-sensitive costs; would harm consumers by limiting new entrants' ability to offer innovative rate plans; and would violate § 332(c)(3) of the Act, since such requirements amount to a form of rate structure regulation.
The Commission should follow the Joint Board's recommendation *not* to adopt a specific *Cost-Benefit Test* (¶ 42), since the benefits of designating ETCs – through very real – are difficult to quantify. Similarly, the Commission, like the Joint Board, should *not* recommend specific *Benchmarks* based on the amounts of per-line support disbursed to ILECs (¶ 44), since any such benchmarks would be inherently arbitrary.	It is improper to consider the *Amount Of Federal High-Cost Per-Line Support* in the context of an individual ETC designation proceeding (¶ 43). Indeed, it is unclear how such information should be used in an analytically consistent way. Rather, if the FCC believes support levels to some carriers is excessive, it should address the problem directly by eliminating rural ILEC support formulas based on rate-of-return regulation, and by making other changes to funding formulas.

- ***The Commission Should Facilitate the Redefinition of Rural ILEC Service Areas*** by adopting the Joint Board's recommendation to retain the rules and procedures established in 1997 (¶ 55). In addition, the Commission should allow state PUCs' redefinitions to proceed rather than "initiating proceedings" that force them to languish indefinitely.
  - – The Commission should reverse the precedent established in the *Virginia Cellular Order* holding that the public interest requires rejection of study area redefinition requests and rejection of ETC applications in cases where CMRS carriers cannot serve the highest-cost portions of rural ILEC study areas. 40/
    - » In these cases, wireless ETC applicants are not engaged in improper "cream skimming" – typically they are unable to serve portions of rural ILEC study areas due to license limitations, and due to gerrymandered "study areas" that include widely dispersed territories.

40/ *See* Petition for Reconsideration filed by Virginia Cellular, LLC (Feb. 23, 2004) at 11 *et seq*.

» Moreover, rural ILECs have the opportunity to resolve any "cream skimming" concerns by opting to disaggregate the support in different portions of their study areas.

- ***The Commission Should Improve The Administration of the High-Cost Support Program.***

  – The FCC should adopt its proposal (NPRM, ¶ 5) to allow newly designated ETCs to begin receiving high-cost support immediately as of their ETC designation date, provided that the required certifications and line-count data are filed within 60 days of the ETC designation date.

  – The FCC should not disqualify carriers from receiving support due to untimely filed certifications (NPRM, ¶ 5). This inflexible rule in the context of ICLS leads to need for multiple waivers, often due to circumstances beyond a carrier's control (*e.g.*, state PUCs' failure to meet certification deadlines), and imposes unnecessary burdens on the FCC and carriers. Instead of extending this unnecessarily rigid rule to IAS, the Commission should eliminate it with respect to ICLS.

The FCC should permit wireless ETCs to use the "place of primary use" standard from the Mobile Telephone Sourcing Act (Recommended Decision, ¶ 102) to determine the location of their customers.